SUPREME COURT, U. S.

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IN THE

Supreme Court of the United States

October Term, 1966

No. 1183

ROBERT F. URBANO,

Petitioner,

against

FREDERIC SONDERN, JR.,

Respondent.

and

ROBERT F. URBANO,

Petitioner,

against

FAWCETT PUBLICATIONS, INC.,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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Robert F. Urbano respectfully petitions for a writ of certiorari to review judgments of the United States Court of Appeals for the Second Circuit.

Opinions Below

The opinions of the Court of Appeals are reported at 370 F.2d 13 and 14 (Appendix A). The single memorandum opinion of the District Court is unreported (Appendix B).

Jurisdiction

Both decisions of the Court of Appeals are, dated November 29, 1966. Rehearing was denied December 27, 1966 in the *Sondern* case and January 6, 1967 in the *Fawcett* case.

Jurisdiction of this Court is invoked under 28 U. S. C. § 1254(1).

Questions Presented

1. Shall news media or courts determine guilt?

2. Must the plaintiff prove that he did *not* commit crimes charged in defamatory publications?

3. Without determining voluntariness, are alleged confessions of crime obtained in violation of constitutional rights evidential for any purpose in civil actions?

4. Can prisoners as a class be arbitrarily denied any redress in tort for reckless publications by news media alleging guilt for *other* crimes never officially prosecuted?

5. Does 28 U. S. C. § 1915 exclude prisoners as a class from bringing civil actions other than "habeas corpus"?

Statutes Involved

Title 28 U.S.C. § 1915. Proceedings in forma pauperis.

(a) Any court of the United States may authorize the commencement, prosecution or defense of any suit, action or proceeding, civil or criminal, or appeal therein, without prepayment of fees and costs or security therefor, by a person who makes affidavit that he is unable to pay such costs or give security therefor. Such affidavit shall state the nature of the action, defense or appeal and affiant's belief that he is entitled to redress.

An appeal may not be taken in forma pauperis if the trial court certifies in writing that it is not taken in good faith.

(b) In any civil or criminal case the court may, upon the filing of a like affidavit, direct that the expense of printing the record on appeal, if such printing is required by the appellate court, be paid by the United States, and the same shall be paid when authorized by the Director of the Administrative Office of the United States Courts.

(c) The officers of the court shall issue and serve all process, and perform all duties in such cases. Witnesses shall attend as in other cases, and the same remedies shall be available as are provided for by law in other cases.

(d) The court may request an attorney to represent any such person unable to employ counsel and may dismiss the case if the allegation of poverty is untrue, or if satisfied that the action is frivolous or malicious.

(e) Judgment may be rendered for costs at the conclusion of the suit or action as in other cases, but the United States shall not be liable for any of the costs thus incurred. If the United States has paid the cost of a stenographic transcript or printed record for the prevailing party, the same shall be taxed in favor of the United States. As amended May 24, 1949, c. 139, § 98, 63 Stat. 104; Oct. 31, 1951, c. 655, § 51(b, c), 65 Stat. 727; Sept. 21, 1959, Pub. L. 86-320, 73 Stat. 590.

Statement of the Case

Both diversity actions were commenced in forma pauperis in the United States District Court of Connecticut. However, before the decision of the Court of Appeals in the *Fawcett* case became final, petitioner swore that funds to pay costs had become available but was nevertheless denied leave to proceed in forma pauperis. At little addi-

tional expense and for plenary consideration, the *Sondern* case is included here but any further prosecution of the *Sondern* case in the lower courts must be in forma pauperis.

On May 19, 1960 petitioner was sentenced to life imprisonment in the New Jersey State Prison by the Bergen County Superior Court on plea of "non vult" to the indictment charging felony-murder. See *Urbano* v. *New Jersey,* D.N.J., 225 F.Supp. 798, cert. probable cause den., 3 Cir., 333 F.2d 845, cert. den. 377 U.S. 958.

Prior to conviction, *supra,* a hearing determined that petitioner was competent to stand trial. However, by August 4, 1960 petitioner was officially committed to the State Hospital to undergo intensive electro-shock (21) and narcotic therapy for "schizophrenic reaction, paranoid type" with violent hallucinations. At this time two FBI agents interrogated petitioner for two days and petitioner allegedly signed 10 "statements" actually composed by the interrogators that purport to detail numerous bank and other robberies.

The interrogators, *supra,* swore not but Bergen County Jail records show apparently unsuccessful interrogations there by the same FBI agents. In the *Sondern* case the interrogators also swore, contrary to express allegations of their prior affidavits, that petitioner had *orally* confessed to two additional robberies—necessary to respondent's case. Other invidious contradictions are readily apparent. See *Urbano* v. *FBI,* 87 S.Ct. 117.

In March and April of 1960 four FBI complaints for bank robbery were lodged as detainers but dismissed immediately after the "statements", *supra,* confessing the same crimes allegedly, were obtained. A fifth complaint was then lodged and dismissed on August 11, 1961. Nevertheless, a 7-page "press release" distributed September 14, 1961—officially the FBI denied distribution—alleged the fifth complaint was still pending (Appendix C).

Possibly from electro-shock therapy, *supra,* petitioner is amnesic from May of 1959 to early November of 1960. Petitioner learned of the FBI interrogation from the State Hospital staff. The release, *supra,* was first exhibited in *Urbano* v. *News Syndicate Co.,* S.D.N.Y., 232 F.Supp. 237, rev. & rem., 2 Cir., 358 F.2d 145, cert den. *News Syndicate Co.* v. *Urbano,* 87 S.Ct. 68. The "statements", *supra,* were first exhibited in *Urbano* v. *FBI, supra,* on June 30, 1965.

The *Sondern* Case

The December 1963 issue of *Reader's Digest* carried "The New-Style Bank Robber" by respondent Sondern (Appendix D). On October 20, 1965 leave to proceed in forma pauperis was granted and summons served in New York City on January 13, 1966 with additional summons served in Connecticut on June 7, 1966.

Petitioner moved to strike defenses of, *inter alia,* truth and privilege on the basis of the FBI release. On respondent's cross-motion for summary judgment the district court dismissed but granted leave to file notice of appeal in forma pauperis.

On November 29, 1966 the Court of Appeals affirmed and on December 27, 1966 rehearing was denied. On August 3, 1966 respondent Sondern died and his administratrix was substituted.

The *Fawcett* Case

The January 1963 issue of *True* magazine carried "The Case of the Three-Faced Crook" by Robert Liston (Appendix E). On November 5, 1963 the filing fee was waived but leave to proceed in forma pauperis was denied and the action held in abeyance until petitioner was able to pay the Marshal's fees. An offer of security on eventual recovery of property in France was rejected.

A transfer to the District of Massachusetts was returned to Connecticut on August 3, 1965 as the result of an error on the part of the district court.

On November 2, 1965 the Marshal was paid and an amended complaint served. Petitioner moved to strike the defenses alleged including privilege on the basis of the FBI release and the district court appointed counsel. Over objection on May 16, 1966 respondent was granted leave to add the defense of truth on the basis of the FBI "statements". Thereafter on June 27, 1966 the district court dismissed pursuant to 28 U.S.C. § 1915(d) but granted leave to file notice of appeal in forma pauperis.

Although the court of appeals affirmed on November 29, 1966, the opinion was not forwarded until December 15, 1966. On December 29, 1966, prior to denial of petition for rehearing, petitioner moved to remand the action to the district court since funds received from property in France, originally rejected as security, *supra,* had rendered moot the question of proceeding in forma pauperis. Nevertheless, on January 6, 1967 rehearing was denied, and *then* the remand was denied summarily.

On February 20, 1967 petitioner's motion to reinstate the action and pay costs was denied by the district court. Respondent opposed on the ground that a dismissal pursuant to 28 U. S. C. § 1915(d) was on the merits *even if costs are paid.*

In both cases petitioner's causes of action for libel rest solely upon the references to the bank and other robberies. Nowhere is it contended that publicity given to petitioner's conviction for homicide is libelous.

Petitioner is not incarcerated for and has not been indicted, tried nor convicted of any robbery and the Bergen County Judgment errs in showing a plea of "non vult" to "Murder in the Commission of Robbery" (An Indictment for "Attempt to Rob" was dismissed) where the transcript

and law of New Jersey are to the contrary. Petitioner never knowingly or intelligently confessed to any robbery and ambiguous references by expert witnesses in the sanity hearing in Bergen County are to the homicide or an Arizona burglary conviction or to matters not criminal.

Respondents do not seriously contend that the articles are not defamatory, rather that a once-convicted prisoner may be accused of any other crime that suits the defamer and his readers' fancy because bad character precludes damage to reputation in which a prisoner has no interest in any event.

The Reasons for Granting the Writ

The disposition of the instant cases by the lower courts raises substantial and undecided questions with regard to contempt of news media for the constitutional right to fair trial in a court of law and the equal protection of a prisoner for flagrant violations of his constitutional rights. "[I]f anything can be done to any convicted person, the guarantee of legality has in fact vanished entirely." *Hall's General Principles of Criminal Law* 55-56 (2 ed. 1960).

I.

The cases of *Sheppard* v. *Maxwell*, 86 S.Ct. 1507 and *Estes* v. *Texas*, 85 S.Ct. 1628 reflect need to restrain reckless news media usurping the functions of prosecutor, judge and jury. Outcries against crowded dockets and "pampering" of criminals can be *prevented* in part.

Petitioner is a prisoner but the eminent and respectable are also attacked. And that *Sheppard* finally was released from 10 years imprisonment by a fair trial is not justice. If *Sheppard* should succeed in tort actions, money damages will not compensate him. Prevention of reckless defamation would guarantee a fair trial in the first instance. *Rosenblatt* v. *Baer*, 86 S.Ct. 669 at 676.

II.

The court of appeals holding that petitioner must adduce "specific facts tending to show that he did not commit the crimes mentioned in defendant's article" is contrary to the evidence actually adduced and to constitutional and tort law. This is but another "step in the direction of holding that a judge rather than the jury is to have the determination of any fact in libel cases." *Rosenblatt* v. *Baer, supra.*

The constitutional presumption of innocence must prevail "Once 'libel per se' has been established," and *the defense* must "persuade the jury" that the plaintiff committed the crimes. *Sullivan* v. *New York Times Co.*, 84 S.Ct. 710 and 719 and *Hogan* v. *New York Times Co., D. Conn.* 211 F.Supp. 99, aff'd 2 Cir., 313 F. 2d 354.

III.

After publication, *Urbano* v. *FBI*, 87 S.Ct. 117, respondents discovered and the lower courts relied upon the FBI "statements", elicited from petitioner while committed as insane, to "prove" petitioner committed the crimes. *Ibid.* Due to amnesia petitioner is unable to recollect the circumstances of the FBI interrogations although petitioner's then condition is of record. (See *Gilbert* v. *United States*, 9 Cir., 366 F.2d 923 at 958-959 for possible pressures resorted to by the FBI.)

The voluntariness of the FBI "statements" has never been determined. *Jackson* v. *Denno*, 84 S.Ct. 1774. They may fall within the hypothesis of *Hoffa* v. *United States*, 87 S.Ct. 408 at 416. In any event, they are demonstrably false statements which is a "sound practical reason for barring" them. *United States* v. *64.10 Acres of Land, etc.*, 3 Cir., 362 F.2d 660 at 666.

IV.

Citation of *Mattheis* v. *Hoyt,* W.D. Mich., 136 F.Supp. 119 by the district court and sketchy opinions by the court of appeals foster the false impression that respondents' articles publicize only petitioner's lawful conviction and incarceration for homicide. (See also dissent in *Urbano* v. *News Syndicate Co.,* 2 Cir., 358 F.2d 145.

Actually the complaints are concerned solely with lurid charges in print that petitioner robbed banks and stores whereas, regardless of sources, respondents knew that petitioner has never been tried for nor convicted of a robbery as the FBI release stated. Even if petitioner committed the crimes, arguendo, the proper tribunal is a court of law.

The adverse effect of reckless and unwarranted accusations in print on further prosecution, prison conditions, parole, appeals and new trials cannot be calculated. Every prisoner is not insensible to foul blows when the man is down and to the turning away of anguished family and friends. "[T]he rights and values of private personality far transcend mere personal interests," (*Rosenblatt* v. *Baer,* 86 S.Ct. 669 at 680, perhaps more so in the case of a prisoner.

V.

The district court sets forth that 28 U. S. C. § 1915 should not be "available to prison inmates in non-habeas-corpus matters" since their motives are base, only nominal damages might be awarded, defendants and courts are "harassed", and, in any event, prison inmates have no interest in reputation.

Section 1915 is plain in not excluding meritorious tort actions by prison inmates as a class and, if they *should be* excluded, "the remedy lies with Congress and not with the courts." *Ching Fook* v. *White,* 44 S.Ct. 361. Every citizen

is guarded against invidious discrimination. *Griffin* v. *Illinois*, 76 S.Ct. 585 at 589-590.

That reliance upon Section 1915 to deny grievously-wronged prison inmates any legal recourse was spurious is apparent where both lower courts subsequently denied petitioner leave to prosecute the *Fawcett* case and *to pay costs*. See *Bauers* v. *Heisel*, 3 Cir., 361 F.2d 581, cert. filed No. 528 (ACLU).

VI.

The court of appeals finds it "highly unlikely" that petitioner could prove actual malice to overcome "qualified privilege to report the activities of public officials." See *Hogan* v. *New York Times Co., supra.*

The FBI "press release" is lurid matter indeed on the august stationery of the Department of Justice. Director Hoover swore that distribution was "at the request of the news media." *If* the release was privileged itself, even prima facie its factual errors, contradictory and unfounded conclusions, and ephemeral nature had to be plain to respondents publishing years later—particularly where Sondern swore to his expertise in law enforcement with the FBI and the Fawcett author was warned not to publish while in the course of his minute investigation.

Surely no one is privileged to republish even privileged official material if he *knows* that it is defamatory. From the release itself respondents knew that petitioner had never been prosecuted for nor convicted of any robbery. Only one-third of the *Fawcett* article might derive from the release and Sondern sets forth only the release's conclusions while invidiously associating petitioner with *convicted* bank robbers. Neither article mentions the FBI release as a source.

CONCLUSION

For the foregoing reasons it is respectfully submitted that this petition for a writ of certiorari should be granted.

Respectfully submitted,

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